



5001-06-P

**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Parts 216 and 252**

**[Docket DARS-2018-0044]**

**RIN 0750-AJ99**

**Defense Federal Acquisition Regulation Supplement: Repeal of DFARS Clause "Award Fee" (DFARS Case 2018-D037)**

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Final rule.

**SUMMARY:** DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to remove a clause that is no longer necessary.

**DATES:** Effective [Insert date of publication in the **FEDERAL REGISTER**].

**FOR FURTHER INFORMATION CONTACT:** Ms. Carrie Moore, telephone 571-372-6093.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD is amending the DFARS to remove the DFARS clause 252.216-7005, Award Fee, and the associated clause prescription at DFARS 216.406(e)(2). The DFARS clause advises contractors that: they may earn an award fee from zero dollars to the maximum amount

stated in the award fee plan; an award fee will not be paid for any evaluation period in which the Government rates the contractor's overall cost, schedule, and technical performance below satisfactory; and, the contracting officer may unilaterally revise the award fee plan prior to the beginning of a rating period in order to redirect the contractor's emphasis on performance.

Federal Acquisition Regulation (FAR) 16.401 prescribes the award fee pool percentages that are available to the contractor and required for use by the Government in an award fee plan. Like the DFARS clause, these percentages permit the contractor to earn between 0% and 100% of the award fee pool. Also like the DFARS clause, the FAR requires all award fee plans to prohibit contractors from earning any award fee when the contractor's overall cost, schedule, and technical performance is below satisfactory. While the FAR does not address the unilateral ability to of the contracting officer to make revisions to the award fee plan, as discussed in the DFARS clause, the FAR does require award fee plans to contain reasonable and attainable targets that motivate contractors and discourage inefficiency or waste. Finally, DFARS 216.401 requires the award fee plan to be incorporated into the contract. This action provides contractors with an award fee plan that conveys all of the FAR information and requirements

for award fee plans. As such, this DFARS clause is unnecessary and can be removed.

The removal of this DFARS clause supports a recommendation from the DoD Regulatory Reform Task Force. On February 24, 2017, the President signed Executive Order (E.O.) 13777, "Enforcing the Regulatory Reform Agenda," which established a Federal policy "to alleviate unnecessary regulatory burdens" on the American people. In accordance with E.O. 13777, DoD established a Regulatory Reform Task Force to review and validate DoD regulations, including the DFARS. A public notice of the establishment of the DFARS Subgroup to the DoD Regulatory Reform Task Force, for the purpose of reviewing DFARS provisions and clauses, was published in the Federal Register at 82 FR 35741 on August 1, 2017, and requested public input. No public comments were received on this clause. Subsequently, the DoD Task Force reviewed the requirements of DFARS clause 252.216-7005, Award Fee, and determined that the DFARS clause was unnecessary and recommended removal.

## **II. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items**

This rule only removes DFARS clause 252.216-7005, Award Fee, which is obsolete. Therefore, the rule does not impose any new requirements on contracts at or below the simplified acquisition

threshold and for commercial items, including commercially available off-the-shelf items.

### **III. Executive Orders 12866 and 13563**

E.O. 12866, Regulatory Planning and Review; and E.O. 13563, Improving Regulation and Regulatory Review, direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The Office of Management and Budget (OMB), Office of Information and Regulatory Affairs (OIRA), has determined that this is not a significant regulatory action as defined under section 3(f) of E.O. 12866 and, therefore, was not subject to review under section 6(b). This rule is not a major rule as defined at 5 U.S.C. 804(2).

### **IV. Executive Order 13771**

This rule is not an E.O. 13771, Reducing and Controlling Regulatory Costs, regulatory action, because this rule is not significant under E.O. 12866.

### **V. Publication of This Final Rule for Public Comment Is Not Required by Statute**

The statute that applies to the publication of the FAR is Office of Federal Procurement Policy statute (codified at title 41 of the United States Code). Specifically, 41 U.S.C. 1707(a)(1) requires that a procurement policy, regulation, procedure or form (including an amendment or modification thereof) must be published for public comment if it relates to the expenditure of appropriated funds, and has either a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure, or form, or has a significant cost or administrative impact on contractors or offerors. This final rule is not required to be published for public comment, because DoD is not issuing a new regulation; rather, this rule merely removes an obsolete requirement from the DFARS.

#### **VI. Regulatory Flexibility Act**

Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under 41 U.S.C. 1707(a)(1) (see section V. of this preamble), the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) are not applicable. Accordingly, no regulatory flexibility analysis is required and none has been prepared.

#### **VII. Paperwork Reduction Act**

The rule does not contain any information collection requirements that require the approval of OMB under the Paperwork Reduction Act (44 U.S.C. chapter 35).

#### **List of Subjects in 48 CFR Parts 216 and 252**

Government procurement.

**Jennifer Lee Hawes,**

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 216 and 252 are amended as follows:

1. The authority citation for 48 CFR parts 216 and 252 continues to read as follows:

**Authority:** 41 U.S.C. 1303 and 48 CFR chapter 1.

#### **PART 216 TYPES OF CONTRACTS**

##### **216.406 [Amended]**

2. Amend section 216.406 by-

- a. Removing paragraph (e)(2); and
- b. Redesignating paragraph (e)(1) as paragraph (e).

#### **PART 252-SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

##### **252.216-7004 [Amended]**

3. Amend section 252.216-7004, in the introductory text, by removing "216.406" and adding "216.406(e)" in its place.

##### **252.216-7005 [Removed and Reserved]**

3. Remove and reserve section 252.216-7005.

